

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 03-10496-JMD
Chapter 7

Scott T. Fagnant,
Debtor

Cohen Steel Supply, Inc.,
Plaintiff

v.

Adv. No. 03-1348-JMD

Scott T. Fagnant,
Defendant

*Robert M. Koch, Esq.
Concord, New Hampshire
John E. Laboe, Esq.
Laboe Associates, PLLC
Concord, New Hampshire
Attorneys for Plaintiff*

*Roy W. Tisley, Jr., Esq.
Kelley & Tisley
Manchester, New Hampshire
Attorney for Defendant*

MEMORANDUM OPINION

I. INTRODUCTION

This contentious adversary proceeding was commenced on July 18, 2003, and after multiple discovery disputes and extensions of numerous deadlines was scheduled for a three-day trial to commence on March 29, 2004. On the eve of trial, the Defendant listed on his proposed trial exhibit list a complete general ledger for his prepetition business activities. The Plaintiff

filed a Motion to Exclude those exhibits (Doc. No. 34) and the defendant objected (Doc. No. 37). The trial was continued and the Court heard argument on the Motion to Exclude on March 29, 2004. On March 30, 2004, the Court issued an Order (Doc. No. 40) (the “Sanctions Order”) containing findings of fact and rulings of law. The Sanctions Order denied the Motion to Exclude, found the Defendant’s counsel failed to meet his obligations under Federal Rule of Civil Procedure (“FRCP”) 26(e)(1)¹, and reserved the issue of sanctions under FRCP 37(c)(1).² On June 10, 2004, the Plaintiff filed an Affidavit of Damages (Doc. No. 55) (the “Affidavit”). On July 12, 2004, the Defendant filed his objection to the Affidavit (Doc. No. 66) (the “Objection”). After a hearing on August 30, 2004, the Court took the issue of the amount of the monetary sanction under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

In the Affidavit, the Plaintiff asked the Court to impose sanctions against the Defendant’s counsel pursuant to FRCP 37(c)(1) in the form of ordering reimbursement to the Plaintiff for fees and expenses as follows:

¹ FRCP 26 is applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure (hereinafter “Rule” or “Rules”) 7026.

² FRCP 37 is applicable to this adversary proceeding pursuant to Rule 7037.

Legal Fees & Expenses - Robert Koch, Esq.	\$ 3,684.76
Legal Fees - Laboe Associates, PLLC	\$11,061.50
Expenses - Laboe Associates, PLLC	
Copying of Time Line Exhibit	\$ 40.69
Stenographer	\$ 305.30
Nathan Weschler (expert)	<u>\$ 2,725.50</u>
Total	\$17,817.75

The Defendant objects to the amount of the requested sanction because the Plaintiff did not justify the amount of fees requested using the lodestar analysis method used in the First Circuit to determine the amount of reasonable attorneys fees. See Boston & Maine Corp. v. Moore, 776 F.2d 2 (1st Cir. 1985); In re Public Service of New Hampshire, 160 B.R. 404, 413 (Bankr. D.N.H. 1993). The Defendant also objects because the detailed billing included in the Affidavit shows that much of the claimed fees are duplicative, unproductive, excessive or otherwise unnecessary.

III. DISCUSSION

1. Scope of Sanctions

The purpose of FRCP 37(c)(1) is to uphold and facilitate the mandatory disclosure provisions in FRCP 26. Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo Y Beneficiencia de Puerto Rico, 248 F.3d 29, 34 (1st Cir. 2001). Under FRCP 37(c) the Court has wide latitude in imposing sanctions. Id.

The range of sanctions provided in Rule 37(c), from the most harsh (total exclusion and dismissal of the case) to more moderate (limited exclusion and attorney's fees), gives the district court leeway to best match the degree of non-compliance with the purpose of Rule 26's mandatory disclosure requirements.

Id. citing Klonoski v. Mahlab, 156 F.3d 255, 269 (1st Cir. 1998) (FRCP 37(c) contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of the rule).

In considering what sanctions to impose, the court must bear in mind the rationale and purposes to be served by the sanctions, including: (1) deterring future litigation abuse; (2) punishing present litigation abuse;

(3) compensating victims of litigation abuse; and (4) streamlining court dockets and facilitating case management.

Burton v. R.J. Reynolds Tobacco Co. 203 F.R.D 636, 640 (D. Kan. 2001).

In this case, the Plaintiff sought to exclude the documents that were not timely disclosed by the Defendant. Count One of the Plaintiff's complaint objecting to discharge alleges the Defendant failed to keep or preserve adequate records. It was clear to the Court and the parties that the existence and condition of the Defendant's business records would be a major issue at trial. In the Sanctions Order, the Court ruled that the Defendant acted in good faith in printing and delivering to his counsel a copy of his computerized general ledger on July 22, 2003. Sanctions Order, paragraph 15. The Court also found that while Defendant's counsel did not intentionally conceal the general ledger, he "was at best careless, and at worst negligent" in not timely delivering it to Plaintiff's counsel in accordance with his obligations under FRCP 26(e)(1). See Sanctions Order, paragraphs 16, 17, and 18. The Court decided not to exclude the documents because the Defendant, himself, was not at fault in failing to timely deliver the general ledger documents to Plaintiff's counsel. Accordingly, the appropriate sanction available under FRCP 37(c)(1) is to order the payment of reasonable expenses, including attorneys' fees.

Based upon the record in this case, the Court has no reason to find the Defendant's counsel has a history of failing to comply with the provisions of FRCP 26 or 37, which obviates the need for sanctions to deter future abuse. The imposition of sanctions on Defendant's counsel to compensate the Plaintiff, as determined in this opinion, is sufficient punishment for the acts and omissions described in the Sanctions Order. The Plaintiff is entitled to some compensation for the expense of reacting to uncovering a discovery violation on the eve of trial. Finally, the Court's decision will not impact case management beyond serving as a reminder and warning to all counsel of the provisions of Rule 37(c).

The issue before the Court, therefore, is what compensation is due to the Plaintiff as a sanction for the violation of FRCP 26(e)(1) found by the Court in the Sanctions Order. Once the Plaintiff discovered the Defendant failed to produce the detailed general ledger, its options were limited. Specifically, the withheld documents could have been excluded from the trial or the Court could have granted additional time for discovery on the new documents and considered sanctions against the Defendant. If the evidence was not excluded, the Plaintiff could expect to be compensated for any duplicative time required due to the Defendant's failure to timely produce the general ledger. Finally, the Plaintiff could seek compensation for presenting the Court with the Affidavit.

In the Affidavit, the Plaintiff is seeking attorneys' fees and expenses as follows:

Preparation for Hearing on Motion to Exclude:

Robert Koch	13.6 hrs	\$ 2,149.00
John Laboe	11.3 hrs	\$ 2,260.00
J. Kelleher	28.4 hrs	\$ 2,414.00
<u>PMM</u>	<u>2.4 hrs</u>	<u>\$ 204.00</u>
Total	55.7 hrs	\$ 7,027.00
Average		\$126.16 per hour

Hearing on Motion to Exclude:

Robert Koch	5.3 hrs	\$ 773.00
John Laboe	7.0 hrs	\$ 1,400.00
<u>J. Kelleher</u>	<u>6.5 hrs</u>	<u>\$ 552.50</u>
Total	18.8 hrs	\$ 2,725.50
Average		\$144.97 per hour

Review Denial of Motion to Exclude and Preparation for Deposition:

Robert Koch	0.8 hrs	\$ 128.00
John Laboe	8.9 hrs	\$ 1,780.00
<u>J. Kelleher</u>	<u>12.8 hrs</u>	<u>\$ 1,088.00</u>
Total	22.5 hrs	\$ 2,996.00
Average		\$133.16 per hour

Deposition of Scott Fagnant:

John Laboe	3.3 hrs	\$ 660.00
Average		\$200.00 per hour

Preparation of Affidavit and for Hearing on Sanctions:

Robert Koch	2.3 hrs	\$ 368.00
John Laboe	3.6 hrs	\$ 720.00
<u>J. Kelleher</u>	<u>1.1 hrs</u>	<u>\$ 93.50</u>
Total	7.0 hrs	\$ 1,181.50
Average	\$168.79 per hour	

2. Amount of Sanction

The Court finds the attorneys' fees requested by the Plaintiff are excessive. The Plaintiff's preparation for the hearing on the Motion to Exclude resembles the degree of preparation appropriate for a major trial, not a hearing on a discovery violation. The hearing on the motion to exclude may have been important to the Plaintiff, but it was not a trial on the merits. The Court finds that 1.0 hours by either of the experienced counsel in this case, with 1.0 hours of paralegal help, is more than reasonable for this preparation. The hearing on the Motion to Exclude lasted 3.3 hours. However, the length of the hearing was due in large measure to the Plaintiff's desire to turn the hearing into a preview of the upcoming trial on the merits. Allowing for travel time, a total of 2.0 hours (1.0 hours for the hearing and 1.0 hours of travel time) by one lawyer, not two experienced lawyers and a paralegal, is reasonable.

At the time the availability of the general ledger documents was discovered, the Plaintiff should have been ready for trial. Once the Court denied the Plaintiff's Motion to Exclude, the Plaintiff only needed to examine the new documents and determine how they impacted on the case it was prepared to present. If the general ledger documents had been timely produced, the Plaintiff would still have had the expense of reviewing the ledger and determining how it might impact the trial. Therefore, the Plaintiff is only entitled to request compensation for unnecessary duplicate work, not work it would have been required or elected to do in any event. The Court finds that 1.0 hours of attorney time and 2.0 hours of paralegal time is a reasonable measure of the duplicative time required of the Plaintiff's professionals.

The deposition of Scott Fagnant was required due to the failure to timely produce the general ledger. However, the duration of the deposition appears excessive, given the limited scope of questions the late production of the general ledger should have generated. The Court, therefore, finds that 2.0 hours are reasonable for the deposition.

Finally, the preparation of the affidavit of damages should not have required any more than 0.5 hours of attorney time and 1.0 hours of paralegal time. The Court shall use the midpoint of the hourly rates for the two lawyers representing the Plaintiff as a reasonable hourly rate because they should have been able to split the tasks on a reasonably equal basis.

In summary, the Court finds the amount of time, which reasonably should have been incurred by the Plaintiff, and the reasonable rates, as discussed above, are:

Task	Reasonable Time	Reasonable Rate	Total Allowance
Preparation for Hearing on Motion to Exclude:			
Attorney	1.0	\$180.00	\$180.00
Paralegal	1.0	\$85.00	\$85.00
Hearing on Motion to Exclude:			
Attorney	2.0	\$180.00	\$360.00
Preparation for Deposition:			
Attorney	1.0	\$180.00	\$180.00
Paralegal	2.0	\$85.00	\$170.00
Deposition of Scott Fagnant:			
Attorney	2.0	\$180.00	\$360.00
Preparation of Affidavit of Damages:			
Attorney	0.5	\$185.00	\$92.50
Paralegal	1.0	\$85.00	\$85.00
Total			\$1,512.50

In addition to the attorneys' fees determined to be reasonable, the Plaintiff is entitled to reimbursement for the stenographer's fee for the additional deposition in the amount of \$305.30.

The Plaintiff, however, has not established that the expenses of its expert, Nathan Weschler, were either caused by the Defendant's failure to timely produce the general ledger or are reasonable.

The Court notes that any expense for the Plaintiff's expert to review the ledger would have been incurred if the ledger had been timely produced. Therefore, these fees will not be included in the sanction award. Furthermore, the remaining expenses claimed by the Plaintiff are not reasonable or required in the context of this case.

IV. CONCLUSION

For the reasons set forth in this Memorandum Opinion and the Sanctions Order, the Court shall impose a sanction against counsel for the Defendant in the amount of \$1,817.80 (\$1,512.50 + \$305.30). This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: December 13, 2004

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge